No. 14,416

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

O. L. SHANNON, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

APPELLANT'S PETITION FOR REHEARING

Now comes the Appellant, O. L. Shannon, in the above styled and numbered cause, within the time prescribed by the Rules of this Honorable Court, and petitions this Honorable Court for a rehearing upon the following grounds:

GROUND I:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when, under the record, the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Appellant to either return the grain upon demand or pay for it at its cash value at the nearest terminal market. (Record, struction. (Record, pp. 506-507).

GROUND II:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when, under the contract of storage between Appellant and Commodity Credit Corporation, the parties, by their actions and conduct in dealing with each other thereunder, had interpreted the contract to mean that Appellant had the right under the contract to either return the grain in like quantity and quality or to pay its value in cash as determined at the nearest terminal market, it being a well recognized rule of law that in construing a contract the interpretation placed upon that contract by the mutual consent and actions of the parties shall govern its construction (Record, pp. 506-507).

GROUND III:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Appellant to either return the same quantity and quality of grain that had been stored or return any other grade of merchantable grain and pay the difference in cash. (Record, pp. 506-507.)

GROUND IV:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when the contract of storage contained, in paragraph 15 thereof, a provision declaring the warehouseman, Appellant here, to be the owner of the grain stored under that contract and required him to carry insurance on all stored grain in his own name and not as a bailee or trustee for others, and required him to account only for the *value* of grain destroyed, regardless of the amount of insurance carried or collected by him. (Record, p. 507.)

GROUND V:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal because regardless of the terms of the contract, and the conduct of the parties by which they interpreted the contract, under Article 5645, Revised Civil Statutes of Texas, there could have been no intent to steal or convert the property in question by selling it to prevent spoilage, as a matter of law. (Record, pp. 176 and 506-510.)

GROUND VI:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal because the Government did not prove conversion or theft by appellant of any grain described in the indictment. (Record, pp. 506-510.)

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GROUND VII:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal because the Government failed to prove any actual physical shortage of grain on any date mentioned in any count of the indictment. (Record, pp. 507-508.)

GROUND VIII:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when, under the record, all government witnesses had admitted that they did not actually know how much grain this Appellant had in his warehouses on the various dates mentioned in the indictment and that the only physical inventory they had of his grain in storage was taken long after the periods covered by the allegations of the various counts of the indictment. (Record, pp. 507-508.)

GROUND IX:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for New Trial which should have been granted because of the vindictive, prejudiced, false, and improper statements made by the United States Attorney and his assistants in their arguments to the jury, which statements were not supported by the record and were highly inflammatory and prejudicial to Appellant and influenced the jury to return its verdict of guilty. (Record, p. 36.)

GROUND X:

This Honorable Court erred in not holding that the *grain described in the indictment was the property of Appellant*, because under the "Uniform Grain Storage Agreement", which had been drawn by Commodity Credit Corporation and must be construed strictly as to it, such grain might be returned by Appellant upon demand or he might, at his option, pay its cash value at the nearest terminal market; and sale of the grain by Appellant could not be a willful theft or conversion. (Raised by Motion for Judgment of Acquittal, Record pp. 506-7.)

GROUND XI:

This Honorable Court erred in not holding that Appellant's option to return grain of like quantity and quality or pay its cash value *had been recognized and practiced by the parties to the contract* and that such contract should be construed to mean *what the parties had interpreted it to mean* by their conduct and actions in dealing with each other under the contract. (Raised by Motion for Judgment of Acquittal, Record pp. 506-7.)

GROUND XII:

This Honorable Court erred in not holding that, under the contract, Appellant was permitted to either return the same quantity and quality of grain that had been stored or to return any other merchantable grain and pay the difference in cash, and that under such a contract the stored grain was, as a matter of law, "the property of" Appellant; and his sale of such

grain could not be a willful theft or conversion. (Raised by Motion for Judgment of Acquittal, Record pp. 506-507.)

GROUND XIII:

This Honorable Court erred in not holding that the contract in question, by way of further clarification, contained a specific provision designating the warehouseman as owner of the grain by requiring him, as such owner, to carry insurance on all stored grain *in his own name*, not as bailee or trustee for others, and requiring him to account for *the value* of all grain destroyed, regardless of the amount of insurance carried or collected by him; such provision thus conforming to the other provisions of the contract showing ownership of the grain to be in Appellant. (Raised by Motion for Judgment of Acquittal, Record p. 506.)

GROUND XIV:

This Honorable Court erred in not holding that regardless of the above described provisions of the contract, and the conduct of the parties by which they so interpreted the contract, *there could have been no intent to steal or convert the property in question as a matter of law because Shannon had the legal right to sell said grain to avoid further spoilage under* Article 5645, Revised Civil Statutes of Texas. (Raised by Evidence, Record pp. 181 to 230, and by Motion for Judgment of Acquittal, Record pp. 176 and 509-10.)

GROUND XV:

This Honorable Court erred in not holding that the government totally failed to produce any physical inventory of Shannon's stocks or other tangible evidence of conversion of the grain described in the indictment. (Raised by Motion for Judgment of Acquittal, Record pp. 507-509.)

GROUND XVI:

This Honorable Court erred in not holding that prejudicial and material errors were committed by the prosecuting attorneys in argument of counsel on the trial of the case before a jury. (Raised by Motion for New Trial, Record p. 34, and by objections made during the Argument, Record pp. 513, 516, 521, and 550-51.)

GROUND XVII:

This Honorable Court erred in holding that the issue of "willfully" converting the grain in question was properly submitted to the jury; because under Article 5645 of the Revised Civil Statutes of Texas (see Appendix to Appellant's Brief) and the uncontroverted evidence of spoilage and notice thereof to Commodity Credit Corporation, the issue as to intent, that is, as to whether there was a "willful" conversion, was a question of law and not of fact; and, under such state of the record, there could have been no such criminal intent as a matter of law.

WHEREFORE, Appellant respectfully petitions this Honorable Court to set aside its judgment heretofore

entered herein and to grant him a rehearing; and, upon such rehearing, set set aside said judgment and render judgment herein for Appellant, or, in the alternative, to remand said cause to the trial court for a new trial.

Respectfully submitted,

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and

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Attorneys for Appellant

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Appellant's Petition for Rehearing has been mailed to Hon. Heard F. Floore, United States Attorney for the Northern District of Texas, by registered mail addressed to him at his office in the Federal Courthouse, at Fort Worth, Texas, simultaneously with the filing of the originals hereof with the Clerk of this Court.

One of Appellant's Attorneys

[fol. 622] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,416

[Title omitted]

ORDER DENYING REHEARING—February 3rd, 1954

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 623] Clerk's Certificate to foregoing transcript omitted in printing.